

2014 WL 10049119 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

COMMUNITY CARE CENTER OF ABERDEEN, Appellant,
v.
Mary BARRENTINE, Appellee.

No. 2014-IA-00436.
October 21, 2014.

On Interlocutory Appeal from the Circuit Court of Monroe County, Mississippi
Oral Argument Requested

Reply Brief of Appellant

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*1 INTRODUCTION

Barrentine's premise that she is not barred by the one year statute of limitations is she filed her action in tort, not contract. Regardless of the legal premise behind the cause of action, whether tort or breach of contract, [Mississippi Code Annotated § 15-1-29](#) is applicable, and the one-year statute of limitation therein bars Barrentine's claims. [Section 15-1-29](#) makes no distinction between a "breach of contract" employment action and a "tort" employment action, but limits all employment actions which are *based on* an unwritten contract of employment to a one-year statute of limitation. Barrentine simply cannot separate her wrongful termination of employment claim from her employment relationship. But for her employment relationship she has no claim against Community Care Center, either in tort or contract. Whether the action is one filed in tort or contract is not the determinative factor and Barrentine cannot escape that her claims stem directly from the employment contract, which is subject to [Section 15-1-29](#). Barrentine's claim of wrongful termination is time-barred.

ARGUMENT

I. [Section 15-1-29](#) is Not Restricted to a Breach of Contract Claim and Applies to a Claim of Wrongful Termination.

To avoid the one-year statute of limitation, Barrentine argues [Section 15-1-29](#) only applies to breach of employment contract actions. The language of [Section 15-1-29](#) does not limit its application to breach of contract. The relevant language of [Section 15-1-29](#) provides "...an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of action accrued, and not after." The statute does not limit itself to actions for "breach" of an unwritten contract of employment but imposes a one-year statute of limitations on any action "based on" the unwritten contract of employment. The Legislature could have imposed limitations to [Section 15-1-29](#) by stating it applied to "breach of contract" *2 actions based on an unwritten contract of employment but instead broadly worded the statute to include all "actions" based on an unwritten contract of employment, encompassing an action for wrongful termination, even one alleged to be in tort.

Barrentine spent the majority of her brief setting forth case law which established the legal requirements of the limited public policy exception to the employment-at-will doctrine and which carved out a remedy in tort if employment is terminated in violation of the public policy of Mississippi. This argument ignores the issue before the Court, which is not whether Barrentine may maintain an action in tort or contract if she is terminated in violation of Mississippi public policy, but what statute of limitation applies to a wrongful termination of employment action when there is no contract of employment. Plaintiff misses the issue which is before the Court. Even several cases cited by the Plaintiff for her proposition her claim is in tort rather than contract reference the employment contract. See, e.g., *Kyle v. Circus Circus Mississippi, Inc.*, 430 F.Appx. 247, 250 (5th Cir. 2011) ("Mississippi is an employment-at-will state that follows the common law rule that one who is under a contract of employment for an indefinite term may quit or may be terminated at the will of the employer. 'Either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.'") (internal citations omitted); *Ziegler v. University of Mississippi Medical Center*, 877 F.Supp.2d 454, 464 (S.D. Miss. 2012) ("Mississippi is an employment-at-will state that follows the common law rule that one who is under a contract of employment"..."[T]he Mississippi Supreme Court carved out 'a narrow public policy exception' to the employment at will doctrine....") (internal citations omitted). It is impossible to separate the public policy exception to the employment-at-will doctrine from the employment contract when the concept of employment-at-will is based on the nature of the employment contract.

*3 Not only does the language of [Section 15-1-29](#) not limit itself to breach of contract actions, but the Courts have never limited its application to breach of contract claims. Barrentine has not cited a single decision of the Courts wherein it was held that [Section 15-1-29](#) did not apply to a claim of wrongful termination or only applied to claims filed as breach of contract. The courts have discussed [Section 15-1-29](#) on several occasions, not once holding [Section 15-1-29](#) was limited in application to only employment actions couched in a breach of contract claim. See, *McCool v. Coahoma Opportunities, Inc.*, 45 So.3d 711 (Miss.Ct.App. 2010); *Davis v. Belk Stores Services, Inc.*, 2009 WL 44204 (S.D. Miss. Jan. 6, 2009); *Davis v. Bank of America Corp.*, 2013 WL 666903 (S.D. Miss. Feb. 22, 2013); *Garrett-Greer v. Key Staff Source, Inc.*, 2009 WL 1044589 (N.D. Miss.

April 20, 2009); *Sloan v. Taylor Machinery Company*, 501 So.2d 409 (Miss. 1987); *Michael S. Fawer v. Evans*, 627 So.2d 829 (Miss. 1993).

Finally, Barrentine relies upon an opinion of the Mississippi Court of Appeals to maintain the Courts have previously determined the applicable statute of limitations for a wrongful termination action. However, Appellee's analysis of *Wertz v. Ingalls Shipbuilding, Inc.*, 790 So.2d 841 (Miss.Ct.App. 2000), is incorrect in that the Court was not posed with determining what statute of limitations applied for a claim of wrongful termination when no written contract of employment existed. In *Wertz*, the Plaintiff had not met even the general three-year statute of limitations. The question before the Court was the application of the savings statute of Section 15-1-69 after the Plaintiff's action was dismissed in federal court for lack of subject matter jurisdiction. The analysis of the Court was whether the Plaintiff was entitled to the savings statute upon refiling his claim in state court. While the Court in commentary referenced the general three-year statute of limitations, the Court was not tasked with determining whether a shorter statute of limitations applied and made no finding as to the applicability of *Section 15-1-29*. Barrentine also argues that subsequent unpublished federal court decisions have applied *4 *Wertz* in imposing a three-year statute of limitations; however, neither case cited by Barrentine involved *McArn claims*. *Buntny v. JP Morgan Chase Bank, N.A.*, 2014 WL 652946 (S.D. Miss. Feb. 20, 2014), relied on by Barrentine, is distinguishable in that it was not even an employment action, but an action based primarily on wrongful/fraudulent foreclosure. And, the matter of *McKlemurry v. Thomas*, 2011 WL 3625188 (S.D. Miss. Aug. 17, 2011), was likewise not an action for wrongful termination of employment in violation of the public policy of Mississippi, but the Court rather applied *Wertz* to a claim of tortious interference with employment, which encompasses an entirely different legal analysis than Barrentine's claim of wrongful termination in violation of Mississippi's public policy. Neither *Wertz*, nor *Buntny*, nor *McKlemurry* applied the general three-year statute of limitations to a claim of wrongful termination of employment in violation of the public policy exception to the employment-at-will doctrine when there was no written contract of employment.

Barrentine does not dispute that she did not have a written contract of employment. Her employment with Community Care Center was therefore based on an unwritten contract of employment. Barrentine's employment was at-will. She was terminated from her at-will employment and filed a Complaint alleging her termination violated the public policy exceptions to the at-will employment doctrine. *Section 15-1-29* applies to Plaintiff's claim of wrongful termination.

II. McArn was Based on the Employment Contract, Carving Out an Action in Tort as a Limited Exception to the Employment-At-Will Doctrine.

The public policy exceptions to the employment-at-will doctrine were established in *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So. 2d 603 (Miss. 1993). While Barrentine's argument is that *McArn*, and the line of cases following *McArn*, allow for an action brought in tort when an employee is terminated based on allegations of refusal to participate in illegal *5 activities of his employer or reporting illegal acts of his employer, thereby excluding it from the provisions of *Section 15-1-29*, *McArn* in and of itself was based on the employment contract.

In setting forth the question before the Court in *McArn*, this Court was "call[ed] upon...to revisit our long-standing common law rule that the employment contract at will may be terminated by either party with or without justification." *McArn* at 604. Yet, Barrentine wants this Court to separate the *McArn* action she has filed from the employment contract. The *McArn* claim which Plaintiff files is set forth by *McArn* as follows:

We are of the opinion that there should be at least two circumstances, a narrow public policy exception to the employment at will doctrine and this should be so whether is a written contract or not: (1) an employee who refuses to participate in an illegal act...shall not be barred by the common law rule of employment at will from bringing an action in tort for damages against his employer; (2) an employee who is discharged for reporting acts of his employer to the employer or anyone else is not barred by the employment at will doctrine from bringing action in tort for damages against his employer."

Id. at 607. The public policy exceptions to the employment-at-will doctrine are not separated from the employment contract, whether written or not. [Section 15-1-29](#) applies to any action based on an unwritten contract of employment, which includes the public policy exceptions to the employment-at-will doctrine as set out in *McArn*.

III. Barrentine's Claim Cannot be Separated from the Employment Relationship.

Barrentine simply cannot separate her cause of action from her employment relationship with Community Care Center. Barrentine was employed by Community Care Center and she did not have a written contract of employment. She remained employed until she was terminated for failing to follow policies and procedures of Community Care Center, which she admits. She filed a Complaint alleging that Community Care Center wrongfully terminated that employment relationship in violation of narrow public policy exceptions to the employment-at-will doctrine. *6 And, Barrentine seeks damages she alleges results from the termination of her employment relationship. Although Barrentine's claim may be one sounding in tort under the *McArn* public policy exceptions to the employment-at-will doctrine, the tort is one for termination of the employment contract, which Barrentine alleges was wrongful. The action is based on the unwritten employment contract and therefore subject to [Section 15-1-29](#).

The employment-at-will doctrine relates directly to the terms and contract of employment. This Court has set forth the employment-at-will doctrine as follows:

Mississippi is an employment-at-will state to the extent that we follow the common-law rule that one who is under a contract of employment for an indefinite term may quit or be terminated at the will of the employer, thus meaning that 'either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.

DeCarlo v. Bonus Stores, Inc., 989 So.2d 351, 354 (Miss. 2008) (internal citations omitted). The employment-at-will doctrine is directly related to the employment contract.

The employment at-will doctrine is, in itself, simple to state. In the absence of a formal contract of employment containing a fixed term of employment or creating some contractual expectation of tenure during satisfactory performance, an employee works at the will of his employer and the contract of employment may be terminated at any time by either the employer or the employee without the need for explanation.

McCrary v. Walmart Stores, Inc., 755 So.2d 1141, 1142 (Miss.Ct.App. 1999). If employment-at-will is directly tied to either the existence or non-existence of a definite written employment contract, it follows that the exceptions to the rule likewise cannot be separated from the underlying contract of employment.

IV. The Intent of the Legislature in Creating [Section 15-1-29](#) Should be Applied.

Before this Court is the application of a legislatively-created statute of limitation. "It is a common sense principle of statutory construction that, where conflict is found between a statute *7 stated in general terms and one applying specifically and particularly to the case before the Court, the latter will be preferred." *Kilgore v. Barnes*, 508 So. 2d 1042, 1046 (Miss. 1987). Here, a specific statute of limitation governs all actions which are "based on" an unwritten contract of employment, which should be applied over the general three-year statute of limitation. [Section 15-1-29](#) by the terms of the text in the statute is not limited to actions for breach of contract of an unwritten contract of employment. The plain meaning of the statutory language encompasses any action associated with an unwritten contract of employment, to include a claim of wrongful termination. The intent of the Legislature should be applied in the present action, barring Barrentine's claim of wrongful termination.

CONCLUSION

Barrentine's claim and claimed damage is for wrongful termination of the employment contract. Barrentine had no written contract of employment. She was an at-will employee of Community Care Center. A claim of wrongful termination of the employment contract is subject to a one-year statute of limitations per [Section 15-1-29 of the Mississippi Code](#). Barrentine did not file her claim of wrongful termination until more than one year after her termination from employment. Her claims are barred by the statute of limitations.

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